

**BOARD OF COUNTY COMMISSIONERS**  
**Agenda Item Summary**

**Meeting Date**      August 18, 2004

**Division**

**County Attorney**

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**AGENDA ITEM WORDING**

Public Hearing on Resolution of Recommended Order of Beneficial Use on the applications of Steve Miller and Tonia Sledd.

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**ITEM BACKGROUND**

Special Master John J. Wolfe issued a Recommended Order of Beneficial Use Determination.

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**PREVIOUS RELEVANT BOCC ACTION:**

Adoption of Monroe County 2010 Comprehensive Plan and ROGO.

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**CONTRACT/AGREEMENT CHANGES**

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**STAFF RECOMMENDATIONS**

Approval.

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TOTAL COST

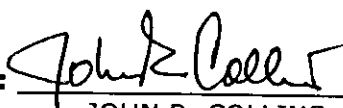
BUDGETED    Yes    No

COST TO COUNTY

SOURCE OF FUNDS

**APPROVED BY:**    County Attorney ■    OMB/Purchasing    Risk Management

**DIVISION DIRECTOR APPROVAL:**

 07/29/04  
\_\_\_\_\_  
JOHN R. COLLINS

**DOCUMENTATION:**

Included ☒

To Follow

Not Required

**AGENDA ITEM #**

P1

**RESOLUTION NO. -2004**

**A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF  
MONROE COUNTY, EVIDENCING THE BOARD'S APPROVAL OF A  
RECOMMENDED BENEFICIAL USE DETERMINATION PROMULGATED  
BY THE SPECIAL MASTER, IN RE: THE APPLICATION OF STEVE  
MILLER AND TONIA SLEDD**

WHEREAS, on January 4, 1996, the Monroe County Year 2010 Comprehensive Plan became effective; and

WHEREAS, the application of Steve Miller and Tonia Sledd for determination of beneficial use was heard by Special Master John J. Wolfe on March 25, 2004; now therefore:

BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA, that:

The Findings of Fact and Conclusions of Law and recommendations of the Special Master as set forth in the proposed determination are APPROVED and the application of Steve Miller and Tonia Sledd is accordingly APPROVED, subject to the conditions listed in the attached Proposed Beneficial Use Determination, dated May 7, 2004

PASSED AND ADOPTED by the Board of County Commissioners of Monroe County, Florida, at a regular meeting of the Board held on the 18<sup>th</sup> day of August, 2004.

Mayor Nelson  
Mayor Pro Tem Rice  
Commissioner McCoy  
Commissioner Neugent  
Commissioner Spehar

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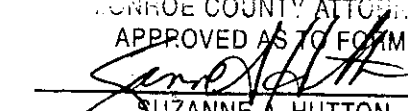
(SEAL)  
Attest: DANNY L. KOLHAGE, Clerk

BOARD OF COUNTY COMMISSIONERS  
OF MONROE COUNTY, FLORIDA

By \_\_\_\_\_  
Deputy Clerk

By \_\_\_\_\_  
Mayor/Chairperson

7/27/2004

MONROE COUNTY ATTORNEY  
APPROVED AS TO FORM:  
  
SUZANNE A. HUTTON  
ASSISTANT COUNTY ATTORNEY  
Date 7/27/04

**BENEFICIAL USE  
MONROE COUNTY SPECIAL MASTER**

In Re: Steve Miller and Tonia Sledd  
Beneficial Use Application

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**PROPOSED  
PARTIAL GRANT OF BENEFICIAL USE**

The application for a beneficial use determination was considered at a duly noticed hearing on March 25, 2004, before John J. Wolfe, designated Beneficial Use Special Master for Monroe County. Andrew M. Tobin represented the Applicant. Robert Shillinger represented Monroe County. Having reviewed and heard all evidence presented, testimony of witnesses and arguments of counsel, the undersigned Hearing Officer makes the findings of fact and conclusions of law and proposes the determination as set forth below.

**ISSUE**

Whether the Applicants have been denied all reasonable economic use of their property by application of Sections 9.5 - 339.2, Automatic High Quality Forest Designation, and 9.5 - 347, Open Space Requirements, of the Monroe County Code (the "Code"), and whether the Applicants are entitled to relief under Policy 101.18.5 of the Year 2010 Comprehensive Plan (the "Plan") and Section 9.5-173 of the Code.

**FINDINGS OF FACT**

1. The subject property is located at 227 South Harbor Drive, Key Largo, Florida 33037, and is described as Lot 15, Block 3, Bay Harbor, Amended Plat, according to the Plat thereof, as recorded in Plat Book 2, Page 91, of the Public records of Monroe County, Florida (the "Lot"), and is within an Improved Subdivision (IS) land use district. The Lot is a 5,068.5 square foot parcel and has existing homes on each side.

2. The Applicants filed an application to build a single family residence on the Lot in September, 2003. The Lot is contiguous with, and part of, a large hardwood hammock area that exceeds thirteen (13) acres in size. The application included a Habitat Evaluation Index (HEI) prepared by a consultant hired by the applicant establishing the quality of the hammock on the Lot as "moderate quality". However, County staff determined that the Lot was "high quality" because, according to Code Section 9.5-339.2, Automatic High Quality Forest Classification, "Tropical hardwood hammocks of twelve and one-half acres or more in size shall be classified as high quality hammocks".

3. The Applicant proposed a development of 2,025 square feet. The Applicant's plan would require 60% development of the 5,068.5 square foot Lot, which is the permitted development for "moderate quality hammock". However, Section 9.5-347, Open Space Requirements, provides that development proposals in "high quality hammock" must provide 80% open space, with the remaining 20% available for development. Providing 80% open space results in a 20% development area of 1013.7 square feet.

4. Although Code Section 339.2 requires the automatic high quality forest designation, the County staff determined that the vegetation on the Lot is of a lesser quality because of the presence of invasive exotics. The Lot's interior contains large patches of invasive plants, including Florida Holly/Brazilian Pepper (*Schinus terebinthifolius*) and Mother-In-Law's-Tongue (*Sanseveria* spp.), the extent of these species is estimated at beyond 40% of the Lot. The Lot is also surrounded on two sides by developed properties, both of which are relatively cleared. The third side is bounded by a paved roadway. The roadway is part of a subdivision which is nearly 50% built out. The Land Authority has stated that the Lot is not on the Authority's Conservation and Natural Areas Acquisition Map and is not targeted for acquisition.

5. County staff believes that Applicant has not been denied all reasonable economic use of the Lot. However, staff points out that in similar cases under the beneficial use process, the County has permitted increased clearing allowances to 2,000 square feet to facilitate the construction of a dwelling unit. Staff notes the example of Policy 204.2.6 of the Plan, which provides for a reduction of the 50 foot setback from wetlands if the setback required by the Plan and the Code results in a lot with less than 2,000 square feet of buildable area.

6. Monroe County, through this process and pursuant to Section 9.5-173(a)(2) of the Code, has agreed to the partial grant to the Applicant of a Beneficial Use determination in order to expand the buildable area of the Lot to 2,000 square feet and to allow parking in the front yard setback, subject to the following conditions:

1. A construction impact zone be included in the 2,000 square feet cleared area, and
2. A deed restriction be placed on the remaining open space as detailed in Section 9.5-337 of the Code.

### **CONCLUSIONS OF LAW**

7. Policy 101.18.5, provides that neither the provisions of the Plan, nor the LDR'S shall deprive a property owner of all reasonable economic use of a parcel of real property which is a lot or parcel of record as of the date of the Plan. This policy further provides that a property owner may apply for relief from the literal application of applicable land use regulations or of the Plan when such application would have the effect of denying all economically reasonable use of that property unless such deprivation is shown to be necessary to prevent a nuisance or to protect the health, safety and welfare of its citizens under Florida Law. All reasonable economic use is defined

as “the minimum use of the property necessary to avoid a taking within a reasonable period of time as established by current land use case law”.

8. Section 9.5-173 of the Code implements the procedure contemplated by Policy 101.18.5 and provides that in order to establish an entitlement to Beneficial Use relief an Applicant must demonstrate that “the Comprehensive Plan and land development regulations” deprive the Applicant of all reasonable economic use of the Lot.

9. As is made clear by Policy 101.18.5, the standards applied to determine whether a regulatory taking has occurred are constitutionally based as set forth in current land use case law. This subject has been addressed by the U.S. Supreme Court in a number of cases, but there are two notable cases applicable to the facts presented here. Both cases involved landowners who claimed that they had been deprived by government regulation of all economically beneficial use of their property.

In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed. 798 (1992), the property owner had purchased two ocean front lots to build single family homes. Two years later all development on the lots was prohibited by South Carolina’s Beachfront Management Act. The Court confirmed the standard that when government regulations deny all economically beneficial or productive use of land, the property owner is entitled to compensation as a taking. In the Lucas case clearly all use was prohibited.

In Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed. 2d 592 (2001), the property owner had purchased approximately 20 acres of land for development. Many years later, but prior to development, regulations promulgated by the Rhode Island Coastal Resources Management Council designated salt marshes of the type on the Palazzolo property as protected coastal wetlands and significantly limited development. When his development project was turned down, the property owner sued alleging a taking under the Lucas standard. In that case, a portion of the land was still developable, which was ascertained to have \$200,000 of development value. While this was significantly less than the development value of the parcel as a whole, the Supreme Court upheld the Rhode Island Supreme Court’s holding that all economically beneficial use was not deprived. Id at 630.

10. Applying the above standard to the facts presented herein of the Code, it has to be concluded that The Plan and LDRs in effect at the time the Applicant filed the subject Beneficial Use Application do not deny the Applicant all reasonable economic use of the Lot, but does deny the Applicant substantial economic use. Applicant could construct a residence of approximately 1,014 square feet. However, under Section 9.5-173(a)(2) and through this proceeding, Monroe County has agreed to partially grant the Applicant Beneficial Use relief as set forth in Paragraph 6 above, in order to provide additional reasonable use of the Lot.

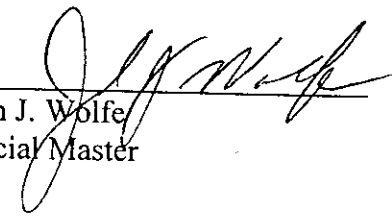
11. The relief granted herein provides the Applicant a 2,000 square foot buildable area, which constitutes a reasonable economic use of the Lot.

## PROPOSED DETERMINATION

As stated above, the Applicant has not been denied all reasonable economic use of the Lot. However, as Staff has noted, the required automatic designation as high quality forest ignores the actual lesser quality of the vegetation on the Lot and denies the applicant reasonable economic use of a substantial portion of the Lot. A literal application of the Code would actually make the removal of the invasive exotics less likely, whereas granting a building permit would require removal of the invasive exotics and make the Lot more compatible with the contiguous hammock. It would also be more consistent with relief granted in similar situations pursuant to the Code.

Based upon the above Findings of Fact and Conclusions of Law, I recommend to the Board of County Commissioners that a final beneficial use determination be entered partially granting Applicants' beneficial use application in accordance with the relief set forth in Paragraph 6 above.

DONE AND ORDERED this 7<sup>th</sup> day of May, 2004.

  
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John J. Wolfe  
Special Master